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No. 02-1169

IN THE

Supreme Court of the United States

CITY OF LODI, CALIFORNIA,
Petitioner,

v.

FIREMAN'S FUND INSURANCE CO.,
UNIGARD INSURANCE CO., AND
UNIGARD SECURITY INSURANCE CO.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Ninth Circuit erred in holding that the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)—which expressly preserves State and local authority to "impos[e] any additional liability or requirements with respect to the release of hazardous substances" (42 U.S.C. § 9614(a))—preempts a municipal ordinance that authorizes the imposition of cleanup standards that are more protective than the federal National Contingency Plan.

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INTEREST OF THE *AMICI CURIAE* [1]

The National League of Cities (NLC) is a non-profit organization whose members include 49 state municipal leagues and approximately 1,800 member cities and towns.

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with the Clerk.

Through the member state municipal leagues, NLC also represents more than 18,000 municipalities. The International Municipal Lawyers Association (IMLA) is a non-profit organization that has served as an advocate for municipal attorneys since 1935. Its members include lawyers from more than 1,400 municipalities. IMLA serves as the legal voice for the nation's local governments and thus has a vital interest in legal issues that affect municipalities.

Municipalities, as the political subdivisions of the States, play a key role in our federal scheme. State and local officials "remain responsive to the local electorate's preferences * * * and remain accountable to the people." *New York v. United States*, 505 U.S. 144, 168 (1992). *Amici* have a strong interest in ensuring that, absent clear and manifest evidence of a contrary congressional intent as reflected in the text of federal legislation, municipalities retain their historic police powers to protect against serious threats to human health, public safety, and the environment. We respectfully urge this Court to review the Ninth Circuit's ruling that CERCLA preempts the more protective cleanup standards authorized by the City of Lodi's Comprehensive Municipal Environmental Response & Liability Ordinance ("MERLO").

PRELIMINARY STATEMENT

The Ninth Circuit's ruling in this case constitutes the rawest form of judicial policymaking under the guise of preemption analysis. It stands in direct contravention of this Court's precedents and congressional commands set forth in the text of the governing statute.

The court below held that municipalities are constitutionally prohibited by the Supremacy Clause from imposing cleanup standards for toxic waste spills more protective than those in the federal National Contingency Plan. Pet. App. 47a, 60a. It reached this sweeping conclusion notwith-

standing the express congressional directive in CERCLA that courts interpret that statute as preserving State and local authority to "impos[e] any additional liability or requirements with respect to the release of hazardous substances within such State." 42 U.S.C. § 9614(a). The Ninth Circuit similarly disregarded two other savings provisions making clear that CERCLA does not "affect or modify in any way" the obligations, liability, or rights established by state and local authorities for the cleanup of hazardous waste contamination. *Id.* §§ 9652(d), 9659(h).

To our knowledge, no other court has so ruled in CERCLA's twenty-year history. The analysis to support this unprecedented holding is contained in but a single sentence (Pet. App. 47a), which simply refers back to the court's conclusion that CERCLA preempts municipal requirements regarding the burden of proof that governs apportionment of liability among potentially responsible parties. Pet. App. 39a-43a. That analysis contains no discussion of the applicable statutory provisions regarding municipal prerogatives. Instead, it turns on the Ninth Circuit's policy judgment that more protective standards and procedures would foster "uncertainty." Pet. App. 42a.

Even more surprising, as discussed below, the Ninth Circuit's policy judgment is supported exclusively by reference to a series of recently issued reports on the cleanup of "brownfield" sites (Pet. App. 40a-42a), *i.e.*, lightly contaminated urban industrial sites often targeted for expeditious cleanup so the site can be returned to productive use. This reliance on brownfield policy is entirely inappropriate given the severe threat faced by the City of Lodi, a toxic contamination site described by the California Supreme Court as "an environmental public nuisance amounting to * * * a tremendous and serious groundwater contamination problem within Lodi's city limits." *Connecticut Indem. Co. v. Superior Court*, 3 P.3d 868, 873 (Cal. 2000) (internal quotes omitted).

More fundamentally, Congress's intent is the ultimate touchstone of every preemption case, and there is not a word in CERCLA to support the Ninth Circuit's conclusion that more protective standards are preempted. To be sure, CERCLA is designed to achieve cleanups that are both expeditious and fully protective of public safety, human health, and the environment. But once CERCLA's minimum requirements are met, the manner in which CERCLA's sometimes competing goals should be balanced is a policy call that Congress expressly left to the States and their political subdivisions, not to the courts. To hold that more stringent municipal cleanup standards for severe groundwater contamination are preempted due to the need for expeditious cleanup of lightly contaminated brownfield sites confirms the folly of judicial policymaking untethered by appropriate statutory constraints.

The Ninth Circuit correctly recognized that CERCLA's three savings provisions protect the authority of States *and* municipalities (as political subdivisions of the States), expressly rejecting Respondents' argument that these provisions extend only to the States themselves. Pet App. 24a-29a. Nevertheless, it ruled that CERCLA impliedly preempts more protective municipal cleanup standards because those standards, in the court's view, stand as an obstacle to CERCLA's purposes. In so ruling, the Ninth Circuit failed even to cite this Court's most recent pronouncement on the effect of savings provisions—*City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 122 S. Ct. 2226 (2002)—which relied on a very similar savings clause to reject a preemption challenge far stronger than the one raised here.

The Ninth Circuit not only ran roughshod over congressionally blessed local prerogatives, it did so with respect to a site that is not on the National Priorities List and has no continuing federal involvement, a site at which CERCLA is not being invoked by any person authorized by

Congress to do so, a site where the State has designated the City of Lodi as the lead enforcement authority to ensure adequate cleanup of its sole source of drinking water. The court below has, for the first time, stripped local officials of their authority, delegated from the States, to take into account unique local circumstances and concerns.

As a result of the ruling below, the roughly 52 million people that live in the nine States and two territories that comprise the Ninth Circuit no longer may rely on the authority and judgment of their local officials regarding the appropriate level of cleanup of toxic waste spills. As national organizations that represent local officials across the country, *amici* also are concerned about the severe chilling effect the ruling will have on local officials throughout the United States.

The Ninth Circuit's contravention of Congress's express commands, its disregard of this Court's precedents, and the national implications of the case all counsel strongly in favor of review by this Court.[2]

ARGUMENT

I. THE NINTH CIRCUIT'S RULING CONTRAVENES THIS COURT'S PREEMPTION PRECEDENTS AND CREATES A CIRCUIT SPLIT ON AN ISSUE OF NATIONAL IMPORTANCE.

This is an "obstacle" or "conflict" preemption case. The Ninth Circuit recognized (Pet. App. 3a) that CERCLA does not expressly preempt the provision of MERLO (§ 8.24.030(A)(5)) that authorizes more protective cleanup

[2] Given the overriding importance of the issue addressed in this brief, we give it our exclusive attention and express no view on the other questions presented by Lodi's petition for a writ of certiorari.

standards. Nor did Congress intend to occupy the field of hazardous waste site remediation. Pet. App. 24a-29a. The court's only basis for finding preemption is its judgment that more stringent local standards would constitute an obstacle to the accomplishment of the objectives of CERCLA. *Id.* at 47a.

The standards for finding obstacle preemption are well established. The Court starts with "'the assumption that the historic police powers of the States [a]re not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress.'" *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 541-42 (2001) (quoting *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A. Inc.*, 519 U.S. 316, 325 (1997)). This presumption against preemption is mandated by both "federalism concerns and the historic primacy of state regulation of matters of health and safety." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).[3]

The purpose of Congress is the "'ultimate touchstone' in every preemption case." *Id.* (quoting *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96, 103 (1963)). Any conflict must be "irreconcilable. * * * The existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute." *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982); *see also English v. General Electric Co.*, 496 U.S. 72, 90 (1990) ("The 'teaching of this Court's decisions * * * enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists.'") (quoting *Huron Portland Cement Co. v. City*

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[3] It is "axiomatic that 'for the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws.'" *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 605 (1991) (quoting *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985)).

of Detroit, 362 U.S. 440, 446 (1960)). Conflict preemption "should be limited to state laws which impose prohibitions or obligations which are in direct contradiction to Congress' primary objectives, as conveyed with clarity in the federal legislation." *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 110 (1992) (Kennedy, J., concurring in part and concurring in the judgment).

Whether local law constitutes a sufficient obstacle to federal law to require preemption "is a matter of judgment," *Crosby v. National Foreign Trade Council,* 530 U.S. 363, 373 (2000), but this judgment is to be made by "examining the federal statute as a whole and identifying its purpose and intended effects." *Id.* This judgment must also be made on a case-by-case basis. *See Geier v. American Honda Motor Co.*, 529 U.S. 861, 873 (2000) (in a conflict preemption case, a court must examine whether state or local law "under the circumstances of th[e] particular case * * * stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress") (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

The opinion below represents a startling departure from these well-established principles. Despite the presumption against preemption and the need for case-by-case analysis, the Ninth Circuit did not even perform a separate preemption analysis regarding Lodi's more protective cleanup standards. Rather, the court simply found preemption "for the same reasons that MERLO's burden of proof is preempted." Pet. App. 47a.

That "same reason" in turn, boils down to a naked policy judgment by the court that more protective local standards are a bad idea:

> Lodi's requirement that a PRP prove by clear and convincing evidence that it caused a divisible portion of the harm is greater than the burden of proof required by CERCLA or HSAA, greater than that normally required in a civil case (preponderance of the evidence), and

> seems both inefficient and inequitable. If we were to approve Lodi's standard of proof, other California cities could follow, adopting hundreds of different liability schemes all more onerous than CERCLA. The risk of overly strict and uncertain liability would thereby be compounded, thwarting CERCLA's goals.

Pet. App. 42a.

The Ninth Circuit failed to cite a single word from CERCLA that suggests that Congress was concerned about "overly strict" or "uncertain" liability for polluters when it passed CERCLA.[4] Instead, the court relied entirely on recent policy reports and law journal articles regarding cleanup of lightly contaminated "brownfields."[5] Pet. App. 40a-42a. The court failed to acknowledge, however, that the Lodi Groundwater Site is not a brownfield and that ineffective cleanup also constitutes an obstacle to the purposes and goals of CERCLA. In any event, such freewheeling policy debates, divorced from statutory text, have no proper role in preemption analysis. Congress expressly left that policy call to the States and their political subdivisions, not to the courts.

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[4] The panel's only attempt to tie its analysis to the purposes of CERCLA is a citation to *Stanton Rd. Assocs. v. Lohrey Enters.*, 984 F.2d 1015, 1019 (9th Cir. 1993), for the proposition that "a fundamental purpose and objective of CERCLA is to encourage the timely cleanup of hazardous waste sites." Pet. App. 39a. There is no allegation that Lodi has failed to act promptly in responding to the Lodi Groundwater Site, and *Stanton* provides no support for the proposition that Congress viewed local standards like Lodi's as an obstacle to the accomplishment of CERCLA's purposes.

[5] Unlike the serious contamination faced by Lodi, "brownfields" are lightly contaminated sites that are often targeted for expeditious cleanup to return them to productive use. *E.g.*, S. Rep. No. 107-2 at 2 (2001).

This Court in *Mortier* pointedly rejected a remarkably similar policy argument asserted as the basis for preemption of local regulations. Responding to Mortier's argument that permitting local pesticide regulations "rais[ed] the specter of gypsy moth hordes safely navigating through thousands of contradictory and ineffective municipal regulations," this Court responded: "Congress is free to find that local legislation does wreak such havoc and enact regulation with the purpose of preventing it. We are satisfied, however, that Congress has not done so yet." *Mortier,* 501 U.S. at 615-16.

As noted above, the intent of Congress is the "ultimate touchstone" in a preemption case. Government reports and law journal articles published decades after a statute was passed have never been used by this Court, or any other court to our knowledge, as the sole basis for finding preemption.

Because the Ninth Circuit departed so dramatically from applicable precedent, it comes as no surprise that other courts have reached diametrically opposed conclusions. For example, the United States Court of Appeals for the Sixth Circuit, in language that could not be clearer, has concluded that "more stringent environmental standards are not preempted by CERCLA." *United States v. Akzo Coatings of America, Inc.*, 949 F.2d 1409, 1454 (6th Cir. 1991). The *Akzo* court emphatically insisted that "CERCLA sets only a floor, not a ceiling, for environmental protection." *Id.* While recognizing that a consent decree entered by a federal court under CERCLA assumes the force of law and thus precludes alternative state remedies (*id.* at 1455), the Sixth Circuit concluded that "CERCLA does not preempt state environmental [requirements] which set higher cleanup standards than the federal statute." *Id.* at 1458. The Ninth

Circuit's ruling to the contrary in the case at bar thus creates a circuit split on an issue of national importance.[6]

II. CONGRESS CAREFULLY PRESERVED AN INDEPENDENT ROLE FOR LOCAL GOVERNMENTS IN REMEDIATING HAZARDOUS WASTE SITES.

A. CERCLA's Savings Clauses Expressly Preserve the Right of Local Governments to Impose "Any Additional Liability or Requirements."

CERCLA does not contain an express preemption provision. To the contrary, it has three separate savings provisions. First, and most importantly, Section 114(a) specifically preserves the ability of States to "impos[e] any additional liability or requirements with respect to the release of hazardous substances within such State." 42 U.S.C. § 9614(a). Although this provision refers only to "State[s]," following this Court's ruling in *Mortier*, the Ninth Circuit

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[6] The Ninth Circuit (Pet. App. 50a n.26) cites three cases as examples of conflict preemption under CERCLA, but they are readily distinguishable and in fact support Lodi's position. Each concerns contribution actions and holds only that Section 113(f) preempts state statutory and common law claims for contribution because these claims would undermine CERCLA's "elaborate settlement scheme." *In re Reading Co.*, 115 F.3d 1111, 1117 (3d Cir. 1997); *accord Bedford Affiliates v. Sills*, 156 F.3d 416, 427 (2d Cir. 1998); *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610 (7th Cir. 1998). These cases provide no support for the Ninth Circuit's sweeping ruling that CERCLA preempts more protective cleanup standards adopted by any municipality, regardless of whether that municipality is a PRP seeking contribution from other PRPs. Moreover, as *Bedford* itself makes clear, CERCLA does not prevent the States or their political subdivisions "from enacting laws to supplement federal measures relating to the cleanup of such wastes." *Bedford Affiliates*, 156 F.3d at 427.

correctly ruled that "the term 'State' is broad enough to encompass political subdivisions." Pet. App. 26a.

Just last Term, this Court restated and reinforced its conclusion from *Mortier*, ruling in *Ours Garage* that "[a]bsent a clear statement to the contrary, Congress' reference to the 'regulatory authority of a state' should be read to preserve, not preempt, the traditional prerogative of the States to delegate their authority to their constituent parts." 122 S. Ct. at 2230. The Court preserved local regulation in *Ours Garage* even though the federal statute at issue expressly preempted regulations by "a State [or] political subdivision of a State" and then saved only "the safety regulatory authority of a State." *Id.* at 2232 (internal quotations omitted). In the case at bar, there is no express preemption; there is only a savings provision. Under *Ours Garage* and *Mortier*, Section 114(a) of CERCLA plainly prevents the conclusion that CERCLA preempts Lodi's more stringent cleanup requirements.

Sections 302(d) and 310(h) provide that CERCLA does not "affect or modify in any way" obligations, liability, or rights established by State and local authorities for the cleanup of hazardous waste contamination. 42 U.S.C. §§ 9652(d), 9659(h). As Senator George Mitchell, a key participant in the drafting of the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), explained on the day President Reagan signed SARA into law:

> [Preemption] is an issue of great importance to many of us, and we have stated repeatedly in this bill that there is no preemption. Any other conclusion is wholly without foundation.

132 Cong. Rec. S17212 (Oct. 17, 1986); *accord* 132 Cong. Rec. S17136 (Oct. 17, 1986) (statement of Sen. Stafford) ("CERCLA, as enacted in 1980, contained only one arguably preemptive provision, which was section 114(c). SARA has repealed even that provision * * *.").

Under *Mortier*, as interpreted and applied in *Ours Garage*, these savings provisions are dispositive. Several factors make preemption even less appropriate here than it was in *Mortier*. First, CERCLA has not one, but three, savings clauses and contains many other statements indicating Congress's embrace of local remediation programs.

Second, the local pesticide regulations at issue in *Mortier* were "enacted independently of specific state or federal oversight." 501 U.S. at 615. In contrast, MERLO was passed by Lodi to comply with the specific terms of its cooperative agreement with California, which required Lodi to enact and enforce "a comprehensive municipal environmental response ordinance which shall enact into municipal law additional legal authorities to appropriately supplement the City of Lodi's already extensive environmental response authority * * *." Pet. App. 11a (quoting Section VI (A)(1) of the "Comprehensive Joint Cooperation Agreement" between California and Lodi).

Third, in *Mortier* the Court had to contend with a considerable amount of legislative history suggesting that Congress in FIFRA wanted localities "out of the picture." *Mortier*, 501 U.S. at 616-23 (Scalia, J., concurring in the judgment). Here, the available evidence suggests that Congress had no intent whatsoever to displace local hazardous waste cleanup requirements.

B. CERCLA Establishes a Regulatory Partnership Between Federal, State, and Local Governments that Belies Any Inference that Local Cleanup Standards Are Preempted.

In passing CERCLA, Congress's "objective [was] to protect the public health and environment against improper disposal of hazardous wastes." *Broward Gardens Tenants Ass'n v. United States*, 311 F.3d 1066, 1076 (11th Cir. 2002). To reach this objective, CERCLA expressly establishes a regu-

latory partnership between federal, state, and local governments that embraces local efforts that contribute to the cleanup of contaminated sites. *Cf. Mortier*, 501 U.S. at 615 (no conflict preemption in part because "FIFRA implies a regulatory partnership between federal, state, *and* local governments").

For example, CERCLA encourages local governments to respond aggressively to environmental harm caused by releases of hazardous substances. Section 106(a) specifies that any federal action taken to abate an imminent threat to health, welfare, or the environment shall be "[i]n addition to any other action taken by a State or local government." 42 U.S.C. § 9606(a). Section 107(d)(2) specifically exempts local governments from liability for "actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person." *Id.* § 9607(d)(2). Section 123(b)(1) provides for reimbursement to local governments for actions taken by local governments that are "necessary to prevent or mitigate injury to human health or the environment * * *." *Id.* § 9623(b)(1).

At federally funded cleanups, CERCLA also specifically authorizes the federal government to enter into cooperative agreements with local governments to "carry out actions authorized in this section." *Id.* § 9604(d)(1)(A). Under these cooperative agreements, CERCLA grants local governments broad authority to demand access to information, *id.* § 9604(e)(1) & (2), to gain entry to potentially contaminated sites, *id.* § 9604(e)(3), and to inspect and take samples at such sites. *Id.* § 9604(e)(4).

C. The National Contingency Plan Does Not Apply to the Lodi Groundwater Site.

The Ninth Circuit's conflict preemption analysis is premised upon the assumption that the Congress and the EPA intended the National Contingency Plan (NCP) to apply to sites such as the Lodi Groundwater Site. The panel concluded that MERLO is preempted to the extent it requires "abatement procedures more stringent than the NCP." Pet. App. 60a. This fundamental presumption by the Ninth Circuit is wrong.

The NCP sets mandatory standards only for federally funded response actions. 40 C.F.R. § 300.400(i)(2). Here, as Lodi explains in detail (Petition at 13-15), federal regulators have had almost no involvement. It is an uncontested fact that there has been no federally funded response action at the Lodi Groundwater Site. By its terms, the NCP is intended to provide only optional guidance for response actions taken by other parties. 40 C.F.R. § 300.400(i)(2) (NCP "may be used as guidance concerning methods and criteria for response actions by other parties under other funding mechanisms.").

It simply makes no sense to base conflict preemption on non-compliance with the NCP at a site where the EPA expressly deems compliance with the NCP to be optional.

D. The Ninth Circuit's Conclusion that CERCLA Preempts Only More Stringent Standards Turns Congressional Intent on Its Head.

Perhaps the most remarkable aspect of the Ninth Circuit's ruling is its conclusion that more stringent local government cleanup standards are preempted by CERCLA, but less stringent regulations are not. Pet. App. 47a-51a. The Ninth Circuit has turned CERCLA on its head.

CERCLA's primary objective is to ensure that hazardous waste sites are cleaned up sufficiently to protect human health and the environment. To achieve this objective at sites on the National Priorities List, Congress specifically required that remedies chosen by EPA achieve compliance with "any * * * state environmental or facility siting law that is more stringent than any Federal standard * * *." 42 U.S.C. § 9621(d)(2)(A)(ii). The NCP makes attainment of these State standards a "threshold" requirement of any remedial action selected by the EPA administrator. 40 C.F.R. § 300.430(f)(1)(i)(A).

As the Sixth Circuit has held, the *only* types of regulation plainly preempted by CERCLA are *less stringent* regulations that a State or local government may try to apply to federally funded cleanup actions. *Akzo Coatings*, 949 F.2d at 1455 ("Congress has neither expressly stated that CERCLA preempts state environmental regulation, (*beyond the obvious preemption of less stringent state standards*), nor enacted so comprehensive a statute that we may infer an intent to displace all supplementary state regulation.") (emphasis added). "CERCLA sets only a floor, not a ceiling, for environmental protection." *Id.* at 1454.

Thus, the Ninth Circuit's ruling that CERCLA sets a ceiling, not a floor, for environmental protection has no support in CERCLA and stands as further evidence that its preemption analysis is thoroughly misguided.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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